Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVE DORMIRE,
Superintendent,
Jefferson City Correctional Center,

Petitioner,

vs.

JAMES KOSTE,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General

MICHAEL J. SPILLANE
Assistant Attorney General
Counsel of Record
Post Office Box 899
Jefferson City, Missouri 65102
(573) 751-3321
Attorneys for Respondent

17 pp

QUESTIONS PRESENTED

1. **Is automatic reversal of a criminal conviction required by the Sixth and Fourteenth Amendments in a case in which a criminal defendant unsuccessfully sought to have guilty plea counsel removed because the defendant had alleged counsel's ineffectiveness in an earlier case, even though the defendant never proved or even alleged any prejudice in the current case?**

2. **Did a state court act contrary to clearly established federal law as determined by the Supreme Court of the United States, within the meaning of 28 U.S.C. §2254(d)(1), when it rejected a claim that guilty plea counsel was necessarily ineffective because her effectiveness had been challenged by the defendant in an earlier case, based on the reasoning that the defendant did not allege any facts showing how his defense was prejudiced and his plea rendered involuntary in the current case by the actions or inactions of counsel?**

PARTIES TO THE PROCEEDING

Petitioner, Dave Dormire, is the Superintendent of the Jefferson City Correctional Center, Missouri where Respondent, James Koste, is confined. Superintendent Dormire was the respondent in a habeas corpus action the district court and the appellee in the Court of Appeals.

Respondent James Koste is a prisoner in state custody. He was the petitioner in habeas corpus action in the district court and the appellant in the court below.

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PETITION FOR A WRIT OF CERTIORARI

The Superintendent of the Jefferson City Correctional Center respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix "App." A4) is reported at 260 F.3d 872. The opinion of the district court (App. A21) is unreported, as is the opinion of the Missouri Court of Appeals in *Koste v. Missouri*, (App. A37)

JURISDICTION

The Court of Appeals entered its judgment on August 13, 2001. Rehearing was denied on October 26, 2001. The jurisdiction of this Court is involved under 28 U.S.C. §1254(i)

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States Amended VI.

"In all criminal prosecutions the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

Constitution of the United States Amendment XIV Section 1.

". . .nor shall any state deprive any person of life, liberty or property without due process of law. . . ."

28 U.S.C. §2254(d)(1).

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly Established Federal law; as determined by the Supreme Court of the United States;

STATEMENT OF THE CASE

This case involves a rejection by the court below of the standard of review set out by this Court for the review of ineffective assistance of counsel claims in *Strickland v. Washington*, 466 U.S. 668 (1984). The court below has instead applied a rule of automatic reversal if a criminal defendant alleges a personal conflict with counsel, and a trial or guilty plea court does not adequately investigate the complaint prior to proceeding. The decision of the court below expands a rule limited to cases of an attorney representing conflicting interests or parties in the same case to general allegations of conflict between an attorney and his client. The decision of the court below is contrary the decisions of this Court and other circuit courts of appeals.

Additionally, by finding the decision of state court which is essentially consistent with all decisions of this Court is contrary to clearly established federal law as determined by the Supreme Court of the United States the court below has reopened the breach between the circuits on the proper scope of review for habeas corpus actions by state prisoners that was closed by *Williams v. Taylor*, 529 U.S. 362 (2000).

A. Respondent's Allegations at his Guilty Plea and Sentencing

On November 13, 1995 James Koste pled guilty to five counts of sodomizing a child under fourteen years of age and was sentenced to five concurrent terms of thirty years imprisonment without the possibility of probation or parole (App. A21). At the time Koste committed these offenses he was on probation for convictions for rape and sodomy for which he had been sentenced to life in prison, but the sentences had not been executed and he had been placed on probation.

Before his guilty plea on the five sodomy counts, Koste filed a written *pro se* motion alleging a conflict existed between himself and his attorney Johnson, a public defender, because he had filed a post-conviction relief motion charging ineffectiveness against

"agenced attorneys said office" challenging the earlier convictions for which he had been placed on probation (App. A62). He was represented by different public defenders , Grunanger and Lundt, in the earlier case (App. A66).

After sentencing Koste again stated that he felt he had a conflict with appointed counsel for the reasons set out in his written motion (App. A82). The trial court rejected the claim stating "The Court is not going to try that PCR as being no legal suit against Ms. Johnson [guilty plea counsel in the current case] and the court herein denies that" (App. A83).

B. **The Court Opinions in This Case**

Koste alleged in the Missouri Court of Appeals that his guilty plea counsel had a conflict of interest because he had challenged her effectiveness in the post-conviction motion challenging his earlier convictions[1] (App. A45). The Missouri Court of Appeals rejected this ineffectiveness claim because Koste did not allege facts showing how his defense was prejudiced and his guilty plea was rendered involuntary by the alleged actions or inactions of trial counsel and that "[t]hese conclusory allegations do not show how the matters complained of resulted in prejudice to his interests" (App. A45).

The district court left the decision undisturbed in habeas corpus review, finding that the determination that Koste did not plead facts showing how he was prejudiced by the alleged conflict was a reasonable determination of the facts under 28 U.S.C. §2254(d)(2) and the decision was "not contrary to clearly established federal law" under 28 U.S.C. §2254(d)(1) (App. A31).

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[1]Although it appears from the record that Koste actually alleged to the guilty plea court a conflict based on representation by the same office, as opposed to personal representation in the earlier case, all subsequent analysis by courts and parties has treated the claim as one of conflict based on personal representation in the earlier case. For practical purposes, the legal analysis would seem to be the same.

The Court of Appeals however reversed the district court, finding that the determination of the Missouri Court of Appeals that Koste must show some prejudice from the alleged conflict of interest was "contrary to" the decision of the United States Supreme Court in *Holloway v. Arkansas*, 435 U.S. 475 (1978) and that the guilty plea court's failure to make further inquiry into the alleged conflict of interest required automatic reversal of the convictions regardless of Koste's failure to show any prejudice resulting from the alleged conflict.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court below that a conviction must be automatically reversed without any showing of prejudice in a case in which a criminal defendant has alleged a conflict based on his own accusations that counsel was ineffective in an earlier case is contrary to the decisions of this Court and other circuit courts of appeals.

There is a special rule for demonstrating ineffective assistance of counsel in cases in which an attorney actually represents conflicting parties or interests in a criminal trial: A defendant need only show the actual representation of conflicting interests in the same proceeding and that this prejudiced representation. Automatic reversal is called for in a case in which trial counsel is directed to represent multiple defendants but informs the trial court he cannot do so due to the conflicting interests of his clients but counsel, without investigation of his allegations, is directed to proceed anyway. This is a constructive denial of counsel to the defendants. In all other cases, that do not involve an actual or constructive denial of counsel, this Court and other circuit courts follow the general rule, confirmed in *Strickland*, that a criminal defendant must demonstrate that incompetence created a reasonable probability the outcome of the proceeding was changed.

The Missouri Court of Appeals decided Koste's case using the general rule requiring a showing of prejudice. But the Eighth Circuit Court did not accept this decision, instead expending the scope of the special rule of automatic reversal to cover a case in which a counsel did not represent conflicting interests or parties in the same proceeding. This expansion conflicts with the decision of this Court and other circuit courts of appeals.

The origins of the special rule go back to the initial dual representation case *Glasser v. United States*, 315 U.S. 60 (1942). There this Court found a denial of the right to counsel occurred in a dual representation case in which a defendant had opposed dual representation and his defense in a close case was hampered by not

having his own counsel in the case. Relying on *Glasser*, this Court, in *Holloway v. Arkansas*, 435 U.S. 475 (1978), found a denial of the right to counsel occurred when a lawyer assigned to represent multiple co-defendants told the trial court in his role as an officer of the court that their defenses conflicted and he could not adequately represent all of them, but the trial court without investigating the claim forced him to proceed. In *Holloway*, this Court required the automatic reversal of a conviction, without a showing of prejudice, due to the trial court's failure to investigate counsel's assertions as an officer of the court that he could not proceed adequately with multiple representation due to his clients' conflicting interests and the resulting constructive deprivation of counsel. *Id.* As this Court stated in *Cuyler v. Sullivan*, 446 U.S. 335, 345 (1980) "*Holloway* requires state trial courts to investigate timely objections to multiple representation."

Holloway is a case that deals specifically with the unique situation of an attorney in a multiple representation cases, in which a trial judge has refused to inquire into an alleged actual conflict. If such an inquiry were made the proper standard of review would be to determine if counsel was actively representing conflicting interests. If no complaint is made about a conflict, prior to trial, a defendant must show representation of actually conflicting interests and an adverse impact on the defense to show ineffectiveness. *Cuyler v. Sullivan*, 446 U.S. 358-350.

In *Strickland v. Washington*, 466 U.S. 668, 692 (1984), this Court reiterated the *Cuyler* rule in a conflict of interest case that prejudice may only be presumed if a criminal defendant meets a burden of demonstrating that counsel actively represented conflicting interests in a case and this actual conflict adversely affected the representation, before going on to point out that the general rule is that to show ineffectiveness a defendant must prove incompetence by counsel and a reasonable probability this incompetence changed the outcome of the proceeding. The rules of *Cuyler* and *Holloway* apply only in cases in which an attorney represents conflicting parties or interests in the same proceeding. Nothing in this Court's precedents supports the idea that an alleged personal conflict between a criminal

defendant and his attorney requires automatic reversal without a showing of prejudice if a trial court or guilty plea court did not adequately investigate the alleged conflict. Yet the court below held in this case that automatic reversal is dictated by this Court's precedents and granted a writ of habeas corpus despite state court findings that no prejudice had been shown or even pled. The holding of the court below cannot be reconciled with this Court's precedents.

That holding is also in clear conflict with the jurisprudence of other circuit courts of appeals. For instance in *Beets v. Collins*, 65 F.3d 1258, 1265 (5th Cir. 1995) (en banc), the United States Court of Appeals for the Fifth Circuit, sitting en ban found that *Strickland* analysis must be used rather than presumed prejudiced except in cases of multiple representation. Other circuit courts of appeals while not taking as broad a position as the Fifth Circuit that conflict short of multiple representation can never justify divergence from the *Strickland* standard, have held that the type of conflict alleged in this case must be reviewed under the *Strickland* standard. Some examples include the following: *United States v. O'Neil*, 118 F.3d 65, 72 (2nd Cir. 1997) (civil suit between attorney and criminal defendant did not remove the case from *Strickland* analysis); *United States v. White*, 174 F.3d 290, 294-297 (2nd Cir. 1999) (complaints about counsel's performance did not create conflict of interest to be evaluated outside the *Strickland* framework); *United States v. Moree*, 220 F.3d 65 (2nd Cir. 2000) (general *Strickland* standard used to review alleged conflict based on accusation of counsel's ineffectiveness in earlier representation); *United States v. Burnes*, 990 F.3d 1426, 1438 (4th Cir. 1993) (rejecting claim that bar complaint made against counsel by a defendant prior to trial stated a claim of conflict of interest and noting that the United States Supreme Court had never suggested that conflict between a defendant and a lawyer in a separate proceeding requires reversal of a conviction); *Hale v. Gibson*, 227 F.3d 1298, 1312-1313 (10th Cir. 1995) (interests of client and attorney must be divergent in current litigation for a conflict taking the case outside the *Strickland* standard of review to exist, and such a conflict was not created by counsel's belief that the defendant had burglarized his office).

The decision of the court below that automatic reversal of a conviction is appropriate, based on an allegation by a criminal defendant that his counsel was ineffective in an earlier case is contrary to the jurisprudence of this Court and creates a conflict between the circuit courts of appeals on a matter of critical importance.

II. The decision of the court below interpreting the "contrary to" language of 28 U.S.C. §2254(d)(1) is incompatible with the decision of this Court in *Williams v. Taylor*, 529 U.S. 362 (2001) after similar confusion and threatens to sow the confusion concerning the standard of review to be used in habeas cases that was eliminated by this Court in the *Williams v. Taylor* decision.

The United States Court of Appeals for the Eighth Circuit has read the "contrary to" clause of 28 U.S.C. §2254(d)(1) in a way that significantly broadens the scope of review of state court decisions in criminal cases. That reading is contrary to recent jurisprudence and threatens to reopen a breach between the circuits that this Court recently closed by giving a narrow and very specific definition to the "contrary to" clause.

Section §2254(d)(1) defines when a writ of habeas corpus may be granted on an issue that turns on a question of federal law that has been decided on the merits by a state court. It states that an application for habeas corpus by a prisoner in state custody shall not be granted on any claim adjudicated on the merits in a state court unless the adjudication of the claim "resulted in a decision that was contrary to or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" (emphasis added).

In *Williams v. Taylor*, 529 U.S. 362, 412-413 (2000), this Court resolved a conflict between the circuit courts of appeals by defining the "contrary to" language of the statute as follows: "Under the contrary to clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on materially indistinguishable facts." This Court pointed out in *Williams* that "contrary" is commonly understood to mean "diametrically different" "opposite in character or nature or mutually opposed" and that "a run of the mill" state court decision applying the correct legal rule does not fit within the "contrary to" clause. *Id.* at 405-406.

Before this Court's decision in *Williams v. Taylor*, some circuit courts of appeals viewed the "contrary to" clause as permitting federal habeas courts to conduct *de novo* review of state court merits decisions on purely legally questions. *Williams v. Taylor*, 529 U.S. at 384. Other courts correctly understood the clause to have the narrow meaning this Court defined in *Williams v. Taylor*. *Id.* at 402. The holding of the court below has, without openly acknowledging it, accepted the type of *de novo* review this Court rejected in *Williams v. Taylor*. The state court decision rejected by the court below was not factually indistinguishable from any case in which this Court reached a different result nor did the state court decision reject any rule of law announced by this Court.

The Missouri Court of Appeals in this case rejected Koste's claim of a conflict interest, arising from his allegation that counsel had been ineffective in an earlier case, because Koste did not allege or show any prejudice in the current case arising from the alleged conflict. The court below found this decision to be "contrary to" *Holloway v. Arkansas*, 435 U.S. 475 (1978) which the court below found dictated automatic reversal of the convictions without any specific showing of prejudice.

But *Holloway* did not go nearly that far. There an attorney was appointed to represent three codefendants. He informed the court that because of confidential information received from them he knew they had conflicting interests at trial. The trial court nevertheless ignored the representation of counsel forcing him to proceed and constructively denying the criminal defendants counsel, mandating automatic reversal. The fact pattern of *Holloway* is easily distinguishable from Koste's case. Koste alleged a personal conflict with counsel, but not representation of actually conflicting interests in the same case. The rule of law of *Holloway* can be fairly stated only as that automatic reversal is necessary if counsel, in a multiple representation case informs the court that his clients have conflicting interests, yet a trial court forces him to proceed, without further inquiry into the matter – a rule that does not cover Koste's case.

There is no plausible way to find the decision of the Missouri

Court of Appeals, affirming Koste's conviction to be "contrary to" *Holloway v. Arkansas* without stretching this Court's definition in *Williams v. Taylor* beyond recognition. The decision of the court below in practice ignores this Court's teaching in *Williams v. Taylor* and reimposes *de novo* federal habeas review of state criminal convictions. This action exceeds the authority provided to the court below by Congress through 28 U.S.C. §2254 and should be corrected on certiorari review by this Court.